SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 17 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1611

ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA,

Petitioner,

vs.

ROBERTA BENTZ and RUDOLPH J. BENTZ, JR.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS R. NEWMAN,
Attorney for Respondents,
233 Broadway,
New York, N. Y. 10007
(212) 349-3990

THOMAS R. NEWMAN
STEVEN DIJOSEPH
RICHARD V. CAPLAN
Of Counsel

TABLE OF CONTENTS

	PAGE
INTRODUCTORY	1
STATEMENT	2
The accident	2
The photographic evidence	5
POINT I—There is no reason to grant the writ	6
There has been no violation of petitioner's Seventh Amendment rights as no evidence was ever submitted to raise a triable issue as to defendants' alleged negligence	6
Since there was no evidence which tended to establish negligence on the part of defendants, the "sufficiency of the evidence" is clearly not a question in this case	9
The court's submission to the jury in the first trial of the questions of negligence and contributory negligence and its statement that a verdict in favor of the defendants was against the weight of evidence, was not binding on Judge Platt under the doctrine of the law of the case	10
CONCLUSION	12

Cases Cited

Babcock v. Fitchburg R. Co., 140 N. Y. 308	8
Boyce Motor Lines v. State of New York, 280 App. Div. 693, affd. 306 N. Y. 801	8

PAGE

Dictograph Products Co. v. Sonotone Corp., 230 F.2d 131 11

Digelormo v. Weil, 260 N. Y. 192 8

Epoch Producing Corp. v. Killiam Shows Inc., et al., 522 F. 2d 737 ..... 9, 10

Hartley v. A. I. Rodd Lumber Co., 282 Mich. 652, 276 N. W. 712 5

Kalinowski v. Joseph T. Reyerson & Son, Inc., 242 App. Div. 43, aff'd 270 N. Y. 532 8

Lane v. City of Buffalo, 232 App. Div. 334 8

Lessig v. Reading Transit & Light Co., 270 Pa. 299, 113 Atl. 381 5

Lyle v. State of New York, 44 A. D. 2d 239 8

Magnum Co. v. Coty, 262 U.S. 159 2

Maislin Bros. Transp. v. State of New York, 15 A. D. 2d 853 8

Manaia v. Potomac Electric Power Co., 268 F.2d 793 (4th Cir.), cert. den., 361 U.S. 913 ..... 6, 7

Messinger v. Anderson, 225 U.S. 436 10

Mobile & O. R. Co. v. Bryant, 159 Miss. 528, 132 So. 539 5

Peterson v. Hopson, 306 Mass. 597, 29 N.E.2d 140 11

Ruppert v. Brooklyn Heights R. Co., 154 N. Y. 90 8

Schwartz v. Macrose Lumber & Trim Co., 29 A. D. 2d 781, aff'd 24 N. Y. 2d 856 8

Szczygial v. Isthmian SS Co., 285 App. Div. 877 5

Walker v. Murray, 255 App. Div. 815, aff'd. 280 N. Y. 709 5

PAGE

Wank v. Ambrosino, 307 N.Y. 321 8

White v. Lehigh Valley RR. Co., 220 N. Y. 131 8

United States Constitution Cited

Seventh Amendment 6

Other Authorities Cited

Busch, Photographic Evidence, 4 DePaul L. Rev.:

195, 200 5

Gardner, The Camera Goes to Court, 24 N. Car. L. Rev.:

233 5

235 5

1B Moore's Federal Practice:

p. 453 11

36 Pa. Stat.:

Sec. 2391.1 3

3 Wigmore on Evidence (1955 Pocket Supp.):

p. 54, Sec. 792a 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1611

ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA,

Petitioner,

vs.

ROBERTA BENTZ and RUDOLPH J. BENTZ, JR.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Introductory

This is an ordinary negligence action in which plaintiff's petition for certiorari is bottomed on complaints that are without merit and were considered and properly rejected by the court below both on the appeal and the petition for rehearing.

The predicate for the petition ignores the time honored rule that the purpose of granting certiorari is

POOR COPY

> "[t]o bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." (*Magnum Co.* v. *Coty,* 262 U.S. 159, 163)

There are no such questions in this case.

Statement

The relevant facts are set forth in the comprehensive opinions delivered by Judge Platt of the United States District Court, Eastern District of New York (Petitioner's Appendix pp. A11-A25) and by Judge Moore of the United States Court of Appeals for the Second Circuit (Petitioner's Appendix pp. A1-A8). Accordingly the facts will be dealt with briefly herein.

The accident.

There were no eyewitnesses to the accident. It occurred at about 11:15 p.m. in the northbound lane of Route 309 approximately 500 feet north of the Cedarcrest Boulevard exit in Salisbury, Pa. (Tr. 51, 58).* At that point the road is hilly, there is a 15 to 20 degree upgrade, and the accident took place near the apex of the hill, where the hill levels off (Tr. 59, 66; see photographs, Defts. Exs. C1, 2 and 3).

---

* References in parentheses preceded by "Tr." are to the pages of the stenographic minutes of the trial on February 24, 1975. Those preceded by "Tr. 2/20" are to the trial minutes of February 20, 1975. References followed by the letter "a" are to pages of the "appendix for plaintiff-appellant" filed with the Court of Appeals.

The accident occurred on an unlighted, high-speed limited-access highway at a point where pedestrians had no right to be (36 Pa. Stat. §2391.1) and where the defendants had no reason to expect that a pedestrian would walk into their driving lane (see photographs, Defts. Ex. C-2 and C-4 and Pltf. Ex. 2C).

Rudolph Bentz testified (and, as Judge Platt noted, "there was no evidence to contradict the same", 96a), that

> "as we approached to top of this hill, I remember seeing, like there is a flash or something in front of me, and in a matter of a fraction of a second, there was a smashing sound against my car and my windshield was shattered and the glass was blowing in against me."

The "flash" or "image" or "glimpse of an object" that defendant saw "at almost the precise moment of impact" (Tr. 91), "the split second, the instant before the noise" he heard (Tr. 76), appeared in front of him and "to the left a bit" (Tr. 60). Mr. Bentz did not know what broke the window or what created the thud (Tr. 2/20, Tr. 9, 18).

He further testified that he had no opportunity either to apply his brakes or to slow down from the time he caught a glimpse of the image to his left until the impact "an infinitesimal amount of time", a "split second" later (Tr. 59-60, 87; Tr. 2/20, p. 30). There was no evidence of any skid marks and, as Judge Platt observed (97a) "the evidence quite clearly shows that neither of the defendants was aware of what happened until several minutes after the accident when the occupants of another car came up to them and advised them of the existence of plaintiff's intestate on the highway."

After the impact, defendant managed to keep the Volkswagen under control and bring it to a stop on the right shoulder of the road approximately 400 feet beyond the place where decedent was subsequently found (Tr. 59-60, 88).

Defendants got out of their car, looked around, saw damage to the left front fender, and for the first time "realized that the car had hit something" (Tr. 61). Rudolph Bentz testified (Tr. 61-2):

> "I looked over the roof to my fiancee and said something to the effect, are you okay, and she nodded and said, 'I'm all right,' and I moved to the front of the car and met her there and just looked at each other completely stunned. We had no idea what was going on at that time."

Defendants waved down a passing car and two of the men in it ran back up the hill and then returned and told defendants "something is laying on the road back up there" and "We think you hit a hitchhiker" or "something like that" (Tr. 2/20, pp. 10, 19; Tr. 62).

Shortly thereafter the police arrived (Tr. 62-3). Decedent was pronounced dead by the local coroner at 12:10 a.m. Cause of death was listed as "Accident, Exsanguination, Multiple Severe Lacerations & Compound Fractures" (Defts. Ex. A). There was no evidence that he was ever conscious after the accident.

A sample of decedent's blood alcohol level (tested by the local coroner as required by Pennsylvania law in the case of fatal accidents, Tr. 95) was found to contain 390 milligrams (0.39) percent of Ethynol (Defts. Exs. A and F; Tr. 104). Pennsylvania law considers a person to be under the influence of alcohol at 100 miligrams percent (Tr. 104). According to Dr. Shoemaker, the Chief of the Clinical Toxicology Laboratory of the Pennsylvania

Department of Health, a blood alcohol level of 0.39 indicates that the individual was "severely intoxicated" with "severe impairment" of motor and brain function (Tr. 105).

The photographic evidence.

Since plaintiff's entire case rests on the speculative and conjectural assumption that defendant Rudolph Bentz must, or at least should, have seen decedent before the impact and in sufficient time to avoid the accident, plaintiff suggests that the decedent was struck head-on, by the front of the Volkswagen (Brief for Applt. pp. 9-10).

The photographic evidence conclusively refutes this suggestion and demonstrates that the front of the car was not touched, that the impact was to the left side of the front fender.* See, particularly, Defendants' Exhibits B-1, 2, 3 and 4 which show that the headlight, front bumper and front of the fender are all unscathed while the left front side of the fender at a point behind the

---

* Photographs have been described as "the perfect witness—an eyewitness who cannot forget and whose memory cannot be distorted" (Gardner, *The Camera Goes to Court,* 24 N. Car. L. Rev. 235).

Time and again it has been held that verdicts contrary to photographic evidence cannot stand (*Walker* v. *Murray,* 255 App. Div. 815, *aff'd.* 280 N. Y. 709; *Szczygial* v. *Isthmian SS Co.,* 285 App. Div. 877; Busch, *Photographic Evidence,* 4 DePaul L. Rev. 195. 200, citing *Hartley* v. *A. I. Rodd Lumber Co.,* 282 Mich. 652, 276 N. W. 712; *Mobile & O. R. Co.* v. *Bryant,* 159 Miss. 528, 132 So. 539; *Lessig* v. *Reading Transit & Light Co.,* 270 Pa. 299, 113 Atl. 381). Photographic evidence has its own independent probative value (Gardner, *The Camera Goes to Court,* 24 N. Car. L. Rev. 233; 3 *Wigmore on Evidence,* § 792a, 1955 Pocket Supp., p. 54).

headlight is dented. This plainly indicates that decedent must have walked into the side of the passing car, coming from the direction of the unilluminated center divider of the roadway. These photographs accurately reflect the condition of the car after the accident (Tr. 64, 130).

POINT I

There is no reason to grant the writ.

There has been no violation of petitioner's Seventh Amendment rights as no evidence was ever submitted to raise a triable issue as to defendants' alleged negligence

While the Seventh Amendment preserves a suitor's right to a jury trial, petitioner would so broaden the scope of that amendment as to obliterate the most time-honored and unchallenged, common law exception to the rule, *viz.* cases such as this where the evidence is insufficient to raise a triable issue of fact.

In *Manaia* v. *Potomac Electric Power Co.*, 268 F.2d 793 (4th Cir.), cert. den., 361 U.S. 913, also a wrongful death and personal injury action in which there was no issue of fact requiring the jury's determination, the Court of Appeals wrote:

> "Finally, it is said that granting these judgments n. o. v. was a denial of the plaintiffs' rights under the Seventh Amendment. * * * no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too

firmly rooted in history and tradition for frontal attack. Nor do the parties here suggest that the power be allowed to atrophy, for its employment within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury. The contention does not question the established principles; it merely seeks an obscuring injection of the linguistics of constitutional principle into the familiar process of appraisal of evidence and its associated inferences.

• • • The attempt, therefore, to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this. See the opinion of Mr. Justice Frankfurter in Dick v. New York Life Insurance Co., 359 U.S. 437; Smith v. Reinauer Oil Transport, Inc., 1 Cir., 256 F.2d 646.

Affirmed." (268 F.2d 797-798).

In the instant case nowhere was a theory presented or proven by petitioner that would ascribe to the respondents the slightest amount of negligent behavior. A survey of the facts reveals that all the jury could have inferred from the evidence was a contact between defendants' automobile and the decedent that resulted in his death. Beyond that it would be patently incorrect to go. The inference of negligence on defendants' part did not even rise to the level of speculation or conjecture here but remained totally unsubstantiated and otherwise unproven.

Whether, as has been urged, negligence was spelled out on the basis of circumstantial evidence must be gauged by New York law. That law requires that when circum-

stantial evidence is relied on "the circumstances must be such as to lead fairly and reasonably to the conclusion sought to be established and to exclude any other hypothesis fairly and reasonably." (*Ruppert* v. *Brooklyn Heights R. Co.*, 154 N. Y. 90, 93.)

The inference contended for must be the only one which can be reasonably drawn from the facts (*Maislin Bros. Transp.* v. *State of New York*, 15 A. D. 2d 853, 854; *Boyce Motor Lines* v. *State of New York*, 280 App. Div. 693, 696, affd. 306 N. Y. 801; *Lyle* v. *State of New York*, 44 A. D. 2d 239).

In other words, if an accident can with equal reason be accounted for on any theory other than appellee's negligence, appellant's burden of proof has not been met and his action must fail (*Schwartz* v. *Macrose Lumber & Trim Co.*, 29 A. D. 2d 781, *aff'd* 24 N. Y. 2d 856; *Lane* v. *City of Buffalo*, 232 App. Div. 334; *Babcock* v. *Fitchburg R. Co.*, 140 N. Y. 308, 311; *White* v. *Lehigh Valley RR. Co.*, 220 N. Y. 131; *Digelormo* v. *Weil*, 260 N. Y. 192, 200).

"A possibility of causation will not suffice to impress liability upon a defendant. Conjecture is not enough" (*Kalinowski* v. *Joseph T. Reyerson & Son, Inc.*, 242 App. Div. 43, *aff'd* 270 N. Y. 532). "A cause of action must be something more than a guess." (*Digelormo* v. *Weil*, 260 N. Y. 192, 199.)

The narrated facts demonstrate the complete applicability of what the New York Court of Appeals stated in *Wank* v. *Ambrosino*, 307 N.Y. 321, 323-324, an automobile case factually similar to this one.

> "An inference could be justified that defendants' car hit the man, but since there is nothing at all to show how that came about, there is nothing on which to base a finding of negligent causation.

> True it is that 'in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence', *Noseworthy* v. *City of New York,* 298 N.Y. 76, 80, but before that rule comes into play there must be some showing of negligence, however slight. *Noseworthy,* and similar cases, describe a method of, or approach to, weighing evidence, but there must be a showing of facts from which negligence may be inferred. Here there was none. The statement by one witness that there were 'drag marks' on the street was denied by another of plaintiff's witnesses who was equally positive that they were 'tire marks'. Only by a process of pure conjecture could such testimony be a basis for a verdict of negligence."

Since there was no evidence which tended to establish negligence on the part of defendants, the "sufficiency of the evidence" is clearly not a question in this case

Petitioner asks this Court to decide whether a state or federal test should be used in determining the sufficiency of the evidence in diversity cases. That issue is not presented.

The issue here is whether *any* proof was offered by petitioner from which a jury could find negligence on the part of defendants. To suggest that the issue is sufficiency of evidence is, we submit, to credit petitioner's case with having arguable merit when in fact none can be extrapolated from the record.

The record in this case invokes application of what the Court of Appeals recently said in *Epoch Producing Corp.*

v. *Killiam Shows Inc., et al.,* 522 F. 2d 737, where it discussed the standards governing the determination of the propriety of a district court granting of a judgment n.o.v.:

> "The evidence must be 'such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict,' [citations omitted]
>
> "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. * * * A mere scintilla of evidence is insufficient to present a question for the jury." (522 F.2d at 742-43).

The court's submission to the jury in the first trial of the questions of negligence and contributory negligence and its statement that a verdict in favor of the defendants was against the weight of evidence, was not binding on Judge Platt under the doctrine of the law of the case

The effect to be given to a prior ruling in a case was discussed by Mr. Justice Holmes in *Messinger* v. *Anderson,* 225 U.S. 436, 444. He there stated:

> "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power."

In *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F.2d 131, 135, the court held that the doctrine of the law of the case was a discretionary rule of practice which did not limit the power of the second judge, that the doctrine did not make the first ruling immune from reconsideration by the second judge. The court wrote:

> "As we view it, the question is in substance the same as that which arises when an appellate court upon a second appeal is faced with an earlier decision of its own, especially if the earlier decision happens to be that of a different panel of judges. The second panel has unquestioned power—'jurisdiction'—to deviate from the first, but as a matter of practice it rarely does so; and there is more season to refrain than if two different actions are involved, when the only question is whether to follow a precedent. In any event on both occasions there is no imperative duty to follow the earlier ruling—only the desirability that suitors shall, so far as possible, have reliable guidance how to conduct their affairs."

As was stated in *Peterson* v. *Hopson*, 306 Mass. 597, 603, 29 N.E.2d 140:

> "A judge should hesitate to undo his own work. . . . Still more should he hestiate to undo the work of another judge. . . . But until the final judgment or decree there is no lack of power, and occasionally the power may properly be exercised."

See also, 1B Moore's Federal Practice, p. 453.

CONCLUSION

There is no basis for granting the writ and the petition should be denied.

Dated: New York, N.Y.
May 11, 1976.

Respectfully submitted,

THOMAS R. NEWMAN,
Attorney for Respondents.

THOMAS R. NEWMAN
STEVEN DIJOSEPH
RICHARD V. CAPLAN
Of Counsel